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Paper No. 10

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**JUN 09 2004**

**OFFICE OF PETITIONS**

**ON PETITION**

In re Application of  
Holder et al.  
Application No. 09/863,098  
Filed: May 22, 2001  
Attorney Docket No. 543-00-009

This decision concerns the May 25, 2004 "Petition to Revive Patent - Unavoidable (37 CFR 1.137(a))."

The petition is **DISMISSED**.

The application was held abandoned as of September 21, 2001 for failure to timely submit a properly executed oath or declaration as required by the July 20, 2001 "Notice to File Missing Parts of Nonprovisional Application ("7/20/01 Notice").

The instant petition asserts timely response to the 7/20/01 Notice.

Implied request to withdraw holding of abandonment  
(37 CFR 1.181)

The petition asserts that an executed declaration was timely filed under a September 4, 2001 Certificate of Mailing. In support, the petition is accompanied by a copy of the papers purportedly mailed on September 4, 2001: a "Response to Notice to File Missing Parts of Application - Filing Date Granted," authorizing the USPTO to charge the \$130 surcharge for late filing of a proper declaration to counsel's deposit account; a copy of an executed declaration; and an assignment document including the "Recordation Form Cover Sheet."

The Office has located in the application file a submission bearing a September 4, 2001 Certificate of Mailing. This submission includes the above-mentioned "Response to Notice to File Missing Parts of Application - Filing Date Granted" as well as a "Request for Corrected Nonprovisional Application Filing Receipt" but not an executed declaration. Therefore, the petition fails to substantiate the assertion that an executed declaration was mailed on September 4, 2001. Consequently, the holding of abandonment in this application will not be withdrawn.

Petition to revive under 37 CFR 1.137(a)

The petition seeks to revive the application under the "unavoidable delay" standard of 37 CFR 1.137(a).

A grantable petition under 37 CFR 1.137(a), in the instant case, must include:

- (1) a properly executed oath or declaration and the \$130 surcharge for late filing of such an oath or declaration;<sup>1</sup>
- (2) the \$110 petition fee;<sup>2</sup>
- (3) a **showing** to the satisfaction of the Commissioner that the entire delay in filing a properly executed oath or declaration from the due date until the filing of a grantable §1.137(a) petition was unavoidable.<sup>3</sup>

The §1.137(a) petition lacks item (3), in that, aside from asserting having filed the executed declaration on September 4, 2001, counsel has not provided any evidence or argument for the Office to conclude that the entire delay in filing the executed declaration was "unavoidable" within the meaning of 37 CFR 1.137(a). The §1.137(a) petition is thus dismissed.

A renewed §1.181 or §1.137(a) petition must be:<sup>4</sup>

- filed within **TWO MONTHS** of the mailing date of this decision;<sup>5</sup>
- include proper evidence that the executed declaration was indeed mailed on September 4, 2001 (for renewed §1.181 petition),<sup>6</sup> or, proper showing that the delay in filing the executed declaration was unavoidable (for renewed §1.137(a) petition); and

should be addressed to:

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<sup>1</sup> The \$130 surcharge was charged to Deposit Account No. 01-1125 on 9/10/01.

<sup>2</sup> Enclosed with petition.

<sup>3</sup> See, e.g., MPEP section 711.03(c)(III)(D) (Rev. 1, Feb. 2003).

<sup>4</sup> **Any information/evidence/argument already included in the instant petition should not be re-submitted.**

<sup>5</sup> Extension(s) of time may be obtained under 37 CFR 1.136(a).

<sup>6</sup> For example, a **postcard receipt** itemizing the papers (including an executed declaration) mailed on 9/4/01 for this application and date-stamped 9/10/01 by the USPTO. MPEP 503 (Rev. 1, Feb. 2003).

Finally, the petition uses a correspondence address different from that in the USPTO record for this application, and is signed by a practitioner who does not appear to have a power of attorney from assignee to prosecute this application before the USPTO. While a courtesy copy of this decision is being sent to this practitioner, all future correspondence on this application will be mailed to the current correspondence-address-of-record unless the USPTO is properly instructed otherwise.

Telephone inquiries should be directed to the undersigned at (703) 308-0763.



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